

Marriage is not Consent: The Urgent need to Amend India's Marital Rape Laws

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Introduction

Consent is the heart of every sexual relationship. Consent is a fundamental right that ensures personal autonomy and dignity. However, Indian rape laws, as defined under **Section 63 of the Bharatiya Nyaya Sanhita (BNS)**, explicitly state that sexual intercourse by a man with his wife, if she is not under eighteen years of age, is not rape, which fails to recognize the principle within the bounds of marriage.

This legal stance is in stark contrast to the progressive and egalitarian principles enshrined in the Indian Constitution, particularly **Articles 14, 15, and 21**, which guarantee fundamental rights related to equality and protection of life and liberty. Even though India is evolving in terms of technology, economy, and business, the criminal justice system continues to cling to archaic, patriarchal notions of marriage as an unconditional and irrevocable consent to sex. Consent is not limited to just saying "no"; even subtle body language or hesitation can indicate the absence of consent. Recognizing these non-verbal cues is essential to truly understanding and respecting a person's autonomy.

Amending the law to criminalize marital rape is not just a legal step, but it is also a gender justice and an upholding of individuality. Recognizing marital rape as a crime despite of age criteria would mark a vital step toward protecting bodily autonomy, affirming women's dignity, and aligning Indian law with global human rights standards.

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Historical Background

The legal concept of marital rape exemption in India came from colonial-era British law, which was solely based on patriarchal and religious notions of marriage. The idea originated from **Sir Matthew Hale, an English jurist of the 17th century**, who stated that the "husband cannot be found guilty of a

marital rape upon his lawful wife”. From that, it came like a belief, which means that by marrying, there is an irrevocable consent to sexual intercourse for the duration of the marriage. However, this regressive notion was accepted by Indian law during British rule and from now it remained unchallenged till now.

Section 375 of the Indian Penal Code, enacted in 1860, includes **Exception 2**, which has now been replaced by **Section 63 of the Bharatiya Nyaya Sanhita (BNS)**, explicitly states that sexual intercourse by a man with his wife, if she is not under eighteen years of age, is not rape. This provision continues to survive in a country like India that claims to uphold the constitutional values of equality, dignity, and freedom.

Over the decades, Indian society and the constitutional framework have now evolved by recognizing women as equal citizens with autonomy. Yet, the law still cannot accept that in a household, married women are getting raped by their husbands, it’s just that they have the tag of marriage. This reflects the patriarchal ideologies, where marriage is seen as a license to override consent.

Legal Provisions and Current Framework

Under the Indian Penal Code (IPC), which was replaced by the newly enacted Bharatiya Nyaya Sanhita, 2023 (BNS), the offence of rape is defined under Section 63. While the BNS introduces progressive and positive changes in certain areas of criminal law, unfortunately, it continues to retain the marital rape exception as stated in the Indian Penal Code (IPC), **Exception 2 of Section 375**.

Section 63(1) of the BNS defines rape similarly to the former Section 375 IPC. However, Exception 2 to Section 63(1) states:

"Sexual intercourse by a man with his wife, the wife not being under eighteen years of age, is not rape."

This clause displays the patriarchal mindset of the colonial-era Exception 2 of IPC Section 375, thereby continuing to grant legal immunity to a husband where marriage overrides the consent. Despite widespread advocacy, judicial observations, amendments, and international pressure, the legislature has failed to address this glaring loophole in marital rape.

This exception not only violates **Article 14** (equality before law), **Article 15** (prohibition of discrimination), and **Article 21** (right to life and personal liberty) of the Indian Constitution, but also stands in contradiction to India’s commitments under international treaties like CEDAW. While courts have made so many progressive remarks that are appreciable, such as in *Independent Thought v. Union of India*, legislative reform remains stagnant in criminalizing marital rape.

To truly protect the dignity and autonomy of women, the marital rape exception under Section 63 of the BNS must be repealed, and consent must be recognized as central to all sexual relationships, regardless of marital status, age, caste, etc.

Comparative Legal Position

The introduction of the new Bharatiya Nyaya Sanhita, 2023 (BNS) was seen as an opportunity to modernize India's criminal laws. However, it does, but when it comes to protecting married women from non-consensual sex, the law still falls short. **Section 63(1), Exception 2 of the BNS** continues to state that a man cannot be charged with rape because he has a lawful right over his lawful wife, and having sexual intercourse with his lawful wife will not be considered as rape and unless the age is below 18 years. This exception sends a clear message of patriarchal mindset: Marriage is treated by law as granting a husband the lawful right to sexual intercourse, presuming the wife's consent as automatic and continuous.

In contrast, over 100 countries around the world where marital rape is considered as a crime. The United Kingdom removed this exception in 1991 through the judgment in **R v. R**, where the court held that marriage does not give unconditional rights over a woman's body. Nepal, South Africa, Canada, and Australia are among the countries that have taken steps to legally recognize that consent within marriage is just as important as outside it. Marriage will not override the consent, whether the age is 18, below, or above.

India, despite being a constitutional democracy, continues to ignore the fact that sexual intercourse within marital relationships can also be forced and violent. This exception mainly violates the basic principles of equality, dignity, and personal liberty, which are guaranteed under the Constitution of India. If countries with similar social and cultural structures can criminalize marital rape, so can India. But in India, sadly, women are equally supporting patriarchy as men do. And solely cannot change this mindset. Legal reform is not just a matter of catching up; *it is about doing what is right, just, and long overdue.*

Socio-Legal Implications

The continued legal exception for marital rape under Section 63(1), Exception 2 of the Bharatiya Nyaya Sanhita, 2023 (BNS) has deep and troubling socio-legal consequences. By refusing to recognize non-consensual sex within marriage as rape, under Section 63(1), Exception 2 of the Bharatiya Nyaya Sanhita, 2023 (BNS), which shows the patriarchal mindset that treats women as the property of their husbands rather than as individuals with autonomy and dignity. Male Spouses have to accept the fact that if their partner does not want to have sexual intercourse with them, then they should stop at that time only. They are just a partner, not an owner. This legal immunity not only legitimizes violence but also accepts the weak masculinity that the husband is the owner of the wife rather than a partner.

Socially, this gives a message of silence and helplessness among married women in the name of sanskar, which nowadays is equivalent to the so-called patriarchy. Many suffer in isolation, fearing social stigma, lack of support, or disbelief from law enforcement. The presumption that marriage grants unconditional sexual access not only reinforces gender inequality but also makes women weak in their perspective. Which leads to discouraging women from reporting abuse, and the normalization of marital sexual violence.

Legally, this exception violates Articles 14, 15, and 21 of the Indian Constitution, which provides as the basic rights to every individual despite of sex and age. It also stands in conflict with India's international

obligations under the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* and other human rights treaties.

The failure to criminalize marital rape not only portrays women as weak but also reinforces a false sense of power and dominance among men. Legal amendments alone may not eliminate the crime; what is equally important is making individuals reflect and realize that such acts are deeply wrong. A nation does not progress solely through economic growth, technological advancement, or male dominance. Just as these factors contribute to development, so does the role of women, because **women are nothing less than human beings, just as fundamental and equal as men.**

Arguments for Reforms

In India, the legal system still refuses to recognize marital rape as a crime, hiding behind an outdated legal exception in Section 63(1), Exception 2 of the Bharatiya Nyaya Sanhita, 2023 (BNS) has deep and troubling socio-legal consequences. While the country claims progress in gender justice, the law continues to deny married women the basic right to say "no" within their own homes, the very place where they should feel safest. This patriarchal mindset treats marriage as ownership, not partnership.

- **The Misunderstood Idea of Consent in Marriage**

One of the biggest misunderstood ideas of consent in marriage belief that sex is a husband's right in marriage, not a mutual act. In many homes, women are raised to think that fulfilling their husbands' sexual needs is their duty, regardless of their own will or discomfort. Just because they are earning money for survival, as if women are not handling everything at home by putting all their own needs and desires aside.

- **Legal Discrimination Against Married Women**

By denying rape protection to married women, the law treats them as property. If a stranger forces a woman to have sex, it is rape. But if her husband does it violently or not, it is not rape. This legal double standard violates her constitutional right to equality, dignity, and personal liberty under Articles 14 and 21. Which is given by birth to citizens.

- **Fear of Misuse Should Not Justify Legal Silence**

The argument that criminalizing marital rape may lead to misuse is exaggerated and regressive. Every law, including dowry laws and domestic violence provisions, faces potential misuse, but that has never stopped their existence. Justice cannot be denied to thousands of genuine victims just because a few might lie. And trust me, some men can be innocent, but we cannot deny the fact that women are always victims.

- **Silence of the Law Encourages Social Stigma**

Most victims of marital rape do not speak up, not just because the law won't protect them, but also because society won't believe them. And even if they did, they would be considered to have committed a crime. Because of the so-called tag "lawful wife". They're often told, "He's your husband, not a stranger," as if marriage grants immunity from accountability. This silence normalizes abuse, forcing women to stay in violent marriages for the sake of "family reputation" or "social stability." As if women who are remaining silent, society is already losing their stability and humanity.

- **Mental and Physical Impact is Severe**

Marital rape is not just a private matter; it causes long-term trauma, depression, and physical injuries. Victims are often denied medical care or psychological support, since the system doesn't recognize their suffering as a crime. The trauma is compounded when they are forced to live with their abuser every day.

"And why should women tolerate injustice? Why shouldn't they take a stand, why shouldn't they argue, why shouldn't they live life on their terms? They owe nothing to anyone. They are human beings just like men, there is no difference except for a biological one."

Recommendations

- **Legislative Amendment to Recognize Marital Rape as an Offence**

Section 375 of the Indian Penal Code must be amended to remove Exception 2, which currently exempts non-consensual intercourse between a husband and wife from the definition of rape. The law must recognize that consent is personal, continuous, and revocable, regardless of marital status.

- **Definition of Consent Must Be Uniform and Marital-Neutral**

Consent should be clearly defined in all contexts, including within marriage. The legal framework must affirm that marriage does not grant perpetual or implied consent to sexual activity.

- **Comprehensive Support Mechanisms for Survivors**

There must be state-supported mechanisms to provide survivors of marital rape with medical, psychological, legal, and shelter support. This includes sensitization of police, medical officers, and the judiciary to handle such cases with empathy and seriousness.

- **Judicial Training and Sensitization**

Specialized training should be introduced for judges, prosecutors, and law enforcement to break societal prejudices surrounding marital relationships and understand the psychological trauma associated with marital rape.

- **Public Awareness and Education Campaigns**

Government and civil society must collaborate on awareness campaigns that deconstruct myths about marital rights over women's bodies and promote gender-sensitive understanding of consent and bodily autonomy.

- **Strengthening Gender-Neutral and Gender-Sensitive Legal Reforms**

Any amendment must also ensure inclusivity, considering all individuals in intimate partnerships irrespective of gender identity or sexual orientation, while maintaining a survivor-centric approach.

- **Periodic Review of Laws through a Human Rights Lens**

Legal provisions must be periodically reviewed in alignment with constitutional values of dignity, equality, and international human rights obligations, including those under CEDAW.

Conclusion

Patriarchal mindsets of society that believe that marriage grants unconditional sexual access are one of the main reasons for India's failure to criminalize marital rape. This not only violates the very basic right of a woman's bodily autonomy but also contradicts the constitution, which guarantees equality and dignity of every individual despite of caste, sex, and age. And mainly, everyone should acknowledge that criminalizing marital rape is not an attack on the institution or purity of marriage, but it is mainly and only a step forward to redefining the mutual consent and respect. Mutual consent and respect are the very first basis of every kind of relation. Law should evolve with society, and if the law claims that it upholds the value of gender justice, then it should claim the same thing in marital rape. This is no longer acceptable, and the time to act is now. And the law must affirm that there is no relationship, including marriage, which overrides the consent and respect of women.

"Marriage is built on partnership, not possession — it's two equals sharing life, not one owning the other."

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